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No. 90-897

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

GLEN CADE t/a G & G TOWING, *et al.*,
Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

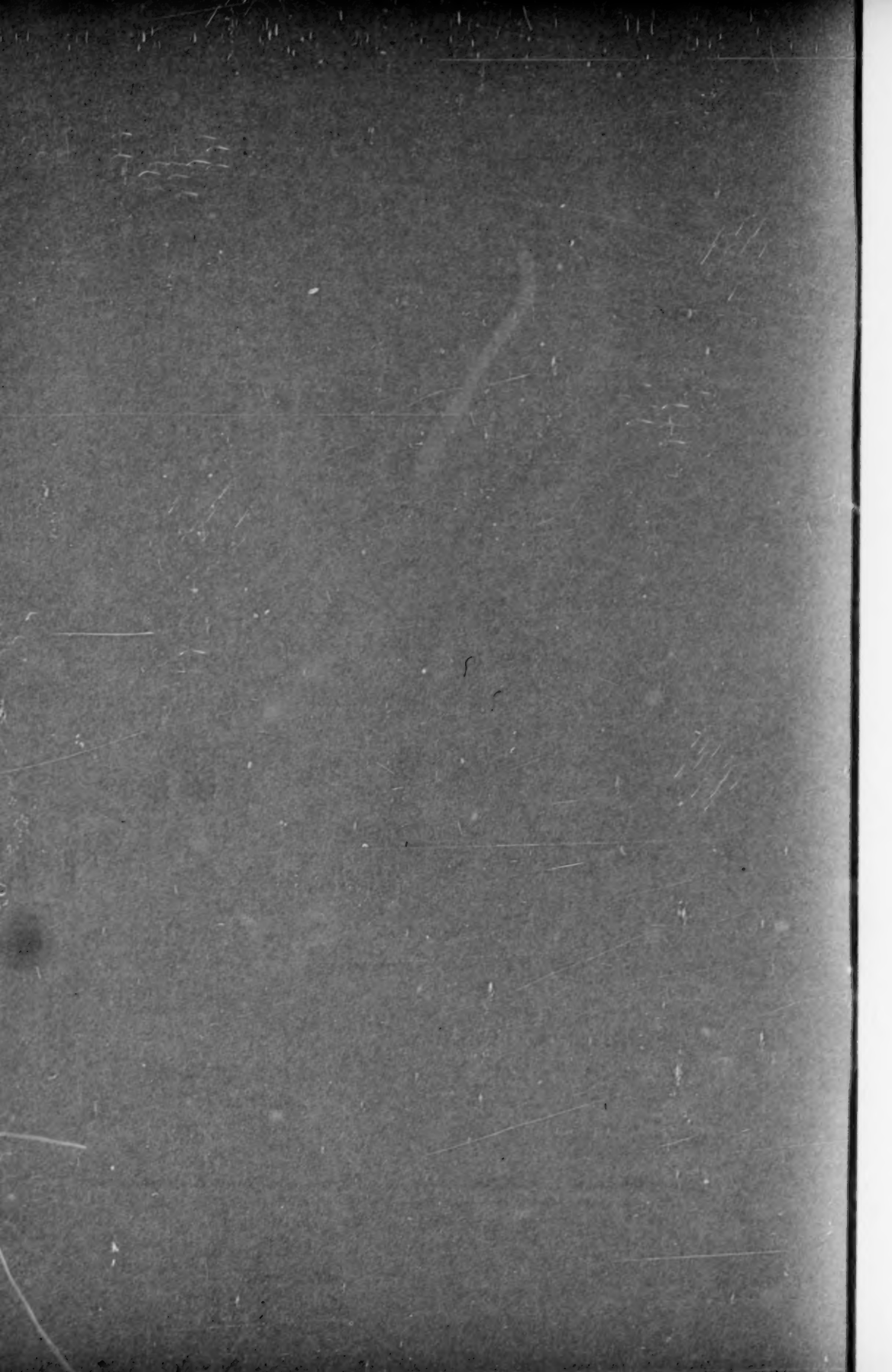
BRIEF IN OPPOSITION

JOYCE R. STERN
County Attorney
(Counsel of Record)

PATRICIA P. HINES
Associate County Attorney
101 Monroe Street
Third Floor
Rockville, MD 20850
(301) 217-2600

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Attorneys for Respondents



QUESTION PRESENTED

DOES A LOCAL ORDINANCE REQUIRING A TOWING SERVICE TO ACCEPT CHECKS AND CREDIT CARDS, IN LIEU OF CASH, FOR PAYMENT OF ALL FEES RESULTING FROM TOWING AND STORAGE OF A TRESPASSING VEHICLE FROM PRIVATE PROPERTY COMPLY WITH THE LEGAL TENDER CLAUSE OF THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDING

This statement serves to correct an inaccuracy in Petitioner's Petition for Writ of Certiorari with regard to the parties. The Respondents are Montgomery County, Maryland, and former Montgomery County Executive Sidney Kramer. The current County Executive for Montgomery County, Maryland, is Neal Potter, who was sworn into office on December 3, 1990.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Montgomery County has adopted a home rule charter under Article X1-A of the Maryland Constitution. Consequently, Article 25A, Section 5(s) of the Annotated Code of Maryland (1990 Repl. Vol.) confers upon Montgomery County the authority to "pass all ordinances, resolutions, or bylaws . . . as may be proper in executing and enforcing any powers enumerated in this section and elsewhere in this Article, as well as such ordinances as may be deemed expedient in maintaining peace, good government, health and welfare of the County."

On February 16, 1988, the Montgomery County Council passed Bill 16-87, which was to take effect on May 26, 1988. The Bill, which is codified in Chapter 30C of the Montgomery County Code, regulates and controls the towing of trespassing motor vehicles from private property without the consent of the vehicle owner, otherwise known as "trespass tows." The Bill was established, in part, as an attempt to address abuses in the towing industry such as the difficulty of vehicle owners in redeeming their towed vehicles. (App. 4c-6c) Significant to the issue which Petitioners' desire to have this Court review, the Bill in Section 30C-8(c) provides, in part, that a towing company must accept, instead of cash, either a credit card slip or a personal check. Sections 30C-8(c) (5) and (6) provide for liquidated damages in the event that a vehicle owner withholds payment on a credit card or stops payment of a check given to the towing company to pay for trespass tows. (App. 6c)

Petitioners, who are engaged in the business of trespass towing of vehicles from private property at the request of private property owners, filed a Complaint for Interlocutory and Permanent Injunction and Declaratory Relief on April 22, 1988, in the Circuit Court for Montgomery County, Maryland, challenging the Bill as unconstitutional. (App. 1a-7a) On May 18, 1988, the Court issued an Interlocutory Injunction enjoining enforcement of the Bill pending a final disposition on the merits, which interlocutory injunction order was subsequently modified to permit Montgomery County to enforce certain sections of the Bill pending final disposition of the case. (App. 3c [n.2])

Thereafter, the parties filed cross-motions for summary judgment. Petitioners argued that the Bill's requirement that checks and credit cards be accepted by towing companies, in lieu of cash, for trespass tows violated the Legal Tender Clause of the United States Constitution. (U.S. Constitution, Art. 1, § 10) Petitioners

argued that Montgomery County was attempting to create a new form of legal tender. Respondents asserted that the Bill did not violate the Legal Tender Clause of the States Constitution because the County was not attempting to coin money or make anything but gold and silver tender in payment of a debt.

On June 16, 1989, the Circuit Court entered an Opinion and Order holding that the Bill did not violate the Legal Tender Clause because Montgomery County was not creating a cash substitute. (App. 3b) However, the Court held that the Bill exceeded the police powers of Montgomery County, Maryland, and thus was unconstitutional in its entirety. (App. 1a-8b)

Petitioners then filed an appeal to the Court of Special Appeals of Maryland challenging the Circuit Court's decision on the legal tender issue and noting other objections. Respondents filed a cross-appeal on the issue concerning the police powers of Montgomery County. The Court of Special Appeals issued a reported decision dated June 27, 1990, reversing the Circuit Court's decision and finding the Bill constitutional in its entirety. (App. 1c-13c) The Court of Special Appeals ruled, among other things, that the checks and credit card requirement did not violate the Legal Tender Clause of the United States Constitution. The Court issued its mandate dated July 27, 1990.

Petitioners filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland on July 31, 1990, which was denied by Order dated August 30, 1990. (App. 1d) Petitioners filed their Petition for Writ of Certiorari to the Supreme Court on November 28, 1990, and seek to have this Court review the decision of the Court of Special Appeals of Maryland upholding the check and credit card requirement of Bill 16-87.

SUMMARY OF ARGUMENT

1. The Court of Special Appeals of Maryland did not rely on a balancing test to determine the constitutionality of the check and credit card requirement under the Legal Tender Clause.

2. The Court of Special Appeals simply found that the check and credit card requirement does not violate the Legal Tender Clause because it does not require towing companies to accept something other than legal tender to discharge a debt.

3. The balancing test used by the Court of Special Appeals of Maryland was applied to the issue of reasonableness of the regulation in confirming that the check and credit card requirement was within the police powers of Montgomery County, Maryland.

4. Petitioners' example relating to the 7-11 convenience store is flawed and implies that Petitioner's misunderstand the purpose of the check and credit card requirement.

5. In the case of *Porter v. City of Atlanta*, 259 Ga. 526, 384 S.E.2d 631 (1989), the Supreme Court of the United States denied certiorari on February 26, 1990. Thus, this Court has already failed to see the need to review the check and credit card requirement.

6. There is no need for this Court to review this matter since all three State appellate courts (Maryland, Georgia, and Washington), as referred to by Petitioners, are in agreement with the constitutionality of the check and credit card requirement. Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Maryland Court of Special Appeals ruled that the requirement in Montgomery County Council Bill No. 16-87 that towing companies accept as payment for towing and storage charges personal checks or credit cards, in lieu of cash, did not violate the Legal Tender Clause of the United States Constitution. (Art. I, § 10, Clause 1, of the U.S. Constitution) The Court of Special Appeals found that the lower court correctly determined that "the provision at issue represents merely an alternative manner of 'cash' payment, rather than establishing a substitute form of legal tender . . ." *Glen Cade t/a G&G Towing v. Montgomery County, Maryland* (No. 1161, September Term, 1989, filed June 27, 1990) p. 13. (App. 12c, 13c)

Petitioners seek to challenge the payment provision contained in Section 30C-8(c)(2)(A) of Bill No. 16-87, entitled "Payment and Promise to Pay," as violative of the Legal Tender Clause. Petitioners claim the Bill requires them to accept something other than cash for payment of the towing debt. In their Petition for Writ of Certiorari ("Petition"), Petitioners allege as the basis for their Petition that the Court of Special Appeals of Maryland and the state appellate courts in Washington and Georgia "seem[ed] to rely on a balancing test between the needs of the government to regulate the towing industry and the requirement of Article 1, § 10, of the United States Constitution." (Petition at p. 6) Petitioners seek this Court's review because they claim it is not clear from a constitutional perspective whether a governmental entity can require a private party to accept a check or credit card for what Petitioners believe is a "purely private transaction."

Petitioners are incorrect in their assessment of the Court of Special Appeals' decision with regard to the use of the balancing test. The Court of Special Appeals, in determining whether the check and credit card require-

ment violated the Legal Tender Clause, did not engage in a balancing test. The Court specifically found that Section 30C-8(c) did not create a new form of legal tender nor did it regulate the value of legal tender. The Court relied on the decision of the Supreme Court of Georgia in *Porter v. City of Atlanta*, 259 Ga. 526, 384 S.E.2d 631 (1989), *cert. denied*, — U.S. —, 110 S.Ct. 1297, 108 L.Ed.2d 474 (1990), which ruled that an ordinance requiring checks and credit cards does not require towing companies to accept something other than legal tender to discharge a debt. The Court held that the debt is discharged upon receipt of cash through a third-party institution. *Id.*, 384 S.E.2d at 634. This determination is quite straightforward and certainly does not require a much more detailed review by this Court.

Although the Court of Special Appeals did not conduct a balancing test of the need for governmental regulation against the constitutional requirement of legal tender, it did state that the requirement of checks and credit cards has a reasonable relation to the vehicle owners' ability to facilitate recovery of their vehicles. *Cade*, at p. 14. (App. 13c) The Court, using a balancing test to determine whether Bill No. 16-87 was a reasonable exercise of police power, confirmed that such a requirement was within the police powers of Montgomery County in that it was reasonably related to the safety and welfare of the people. This balancing test had no bearing on the Court's finding that the check and credit card requirement was constitutional and not violative of the Legal Tender Clause. The balancing test was used to determine the reasonableness of the provision, which was another issue the Court addressed. As such, Petitioners' reasoning for seeking review by this Court is unfounded.

Petitioners seek to provide the Court with an example of the type of regulation sought to be imposed by referring to local convenience stores. Petitioners question whether a local municipality can require a local 7-11 or other convenience store to accept a check or credit card

as payment for a quart of milk. In other words, can governmental regulation of private business extend to forms and methods of payment? Petitioners' question implies that they do not understand the purpose of the Bill as it relates to the 'check and credit card requirement. The situation that exists between the 7-11 store and the individual who wants to purchase the milk is a consensual arrangement. More importantly, the milk belongs to the 7-11 store until the consumer actually purchases the milk by paying the sum requested by the 7-11 owner. In the instant case, the facts are quite different. The debt between the towing companies and the vehicle owners has already been created and is not a consensual arrangement. Furthermore, the vehicle does not belong to the tower but rather to the vehicle owner. The County does not have a substantial need to require a 7-11 store owner to accept checks and credit cards as it does in the towing companies' case.

The real focus of Petitioners' question concerns the reasonableness of the regulation—Is regulating the method of payment, i.e., check, credit card and cash, reasonably related to the safety and welfare of the citizens. The Court of Special Appeals clearly recognized that Bill No. 16-87, including the payment provision requiring checks and credit cards to be accepted by the towing companies in lieu of cash, is a valid exercise of the government in the exercise of its police power. The Court relied on the case of *Crane Towing, Inc. v. Gorton*, 89 Wash.2d 161, 570 P.2d 428 (1977) which clearly upheld as a proper exercise of police power a statute markedly similar to Bill No. 16-87.

In *Crane*, the Supreme Court of Washington recognized that the cash requirement was a way for towing companies to ensure collection of their fees, which arose out of an involuntary arrangement between the towing company and the vehicle owner, but noted that the involuntarily-created relationship placed significant bur-

dens on the vehicle owner or driver. *Id.*, 570 P.2d at 436. The Court noted that there are “[m]any times which he may not have the cash available to retrieve his vehicle, especially in this day and age when individuals rely to a great extent on credit card or acceptance of their personal checks for their day-to-day commercial transactions.” *Id.*, 570 P.2d at 436-437. Finally, the Court recognized that it may be difficult for the consumer to obtain the necessary cash if the vehicle is removed after business hours or if the vehicle is removed on a Friday night and the consumer must wait until the banks open on Monday to obtain the cash. *Id.*, 570 P.2d at 437.

The Court of Special Appeals found persuasive the *Crane* Court’s reasoning that legislation which tends to assist members of the public from involuntarily being separated from their vehicle and which tends to expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public. It is here that the Court utilized a balancing test to determine if the Bill bore a reasonable relation to an important governmental interest and correctly concluded that it did.

Finally, Petitioners argue that the situation created by Bill No. 16-87 in Montgomery County is not unique but has been raised by two other state courts in *Porter* and *Crane*. In *Porter*, the Supreme Court of Washington, as discussed above, specifically found that the check and credit card requirement did not violate the U.S. Constitution. When the towing companies filed a Petition for Writ of Certiorari to the Supreme Court, the Court denied the petition. Further, the *Crane* case recognized the reasonableness of the check and credit card requirement, but did not address the legal tender issue. These two state appellate courts, as well as the Maryland Court of Special Appeals, have agreed that the checks and credit card requirement is constitutional. It is noteworthy that the Maryland Court of Appeals denied certiorari in this case. There is no conflict on the constitu-

tional issues between these state courts nor is there any conflict between these state court decisions and any decision by this Court. See Rule 10.1 of the Federal Rules of the Supreme Court of the United States. Thus, there is no need for this Court to grant the Petition for Writ of Certiorari.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents submit that there are no important and special reasons for the Supreme Court to review the issue presented herein and respectfully request that the Court deny Petitioners' Petition for Writ of Certiorari in this case.

Respectfully submitted,

JOYCE R. STERN
County Attorney
(Counsel of Record)

PATRICIA P. HINES
Associate County Attorney
101 Monroe Street
Third Floor
Rockville, MD 20850
(301) 217-2600

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Attorneys for Respondents